IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

NO. 229.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBIAN ENAMELING & STAMPING
COMPANY, INC., Respondent.

BRIEF OF COLUMBIAN ENAMELING & STAMPING COMPANY, INC., RESPONDENT, IN OPPOSITION TO PETITION OF NATIONAL LABOR RELATIONS BOARD FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

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SUMMARY OF ARGUMENT.

The respondent, Columbian Enameling & Stamping Company, Inc., opposes the granting of a writ of certiorari in this case. The decision of the Court below (R. 415-425, reported at 96 F. (2d) 948) is unquestionably sound. As will appear hereinafter, the facts upon which that decision is based are not comparable with the facts in any other case that has arisen under the National Labor Relations Act. Here a fair collective bargaining agreement, expressly providing against ces-

sation of work for the period thereof, viz., one year, was violated by the calling of a strike, months before the enactment of the Labor Act. The refusal to bargain, charged against the respondent as having occurred after the Labor Act became effective, obviously did not cause the strike, as is the usual state of facts in this type of case. Furthermore, there is no question of great public importance involved herein, nor is there any conflict in the decision of the Court below with the decision of any other Circuit Court of Appeals, nor is there any important question of federal law involved which should be settled by this Court, nor is the decision below in conflict with applicable decisions of this Court, nor are there any other special or important reasons for the granting of the writ.

The petitioner has set forth in its statement commencing on page 4 of its petition and brief certain of the facts involved in the case. This statement in so far as it goes is consistent with the record, but there has been omitted therefrom other facts which are of importance in the present determination and to which reference will be made in the course of our argument.

ARGUMENT.

I.

The Decision of the Court Below Is Consistent With the National Labor Relations Act.

The first reason cited by the petitioner for the granting of a writ of certiorari herein is that the Court below decided an important question of law contrary to the plain language of the National Labor Relations Act. Such a contention is wholly unfounded. There can be no doubt as to the real basis for the decision of the Court below. The Court was very careful to conclude its opinion with a statement that could not be misinterpreted, viz: (R. 423)

> "The holding in this case is, of course, restricted to the particular facts in this case which are:
>
> (a) The withdrawal of the employees before the National Labor Act was enacted.
>
> (b) The employees had a valid short time wage agreement during which they agreed not to strike but to submit differences growing out of the agreement to arbitration.
>
> (c) The employees ceased working in the face of their wage agreement with its anti-strike provision and at a time when there was no Federal Labor Act in force.
>
> "It is needless to add that we are not required to pass upon, nor do we pass upon a case where any one or all of said relevant factors are absent."

It is true, as stated by the petitioner on page 13 of its brief, that the Court below cited certain cases in this Court and in the Circuit Court of Appeals for the Ninth Circuit to the effect that ordinarily the status of

employment exists although a strike occurs before t
passage of the National Labor Relations Act and c
tinues after its passage. It is not true, however, th
no emphasis was placed by the Court on the fact th
under the circumstances the employment relations
ceased prior to the enactment of the Labor Act.
think that under the language of the conclusion of t
decision quoted above, there can be no doubt that
Court below had the two ideas in conjunction, viz., th
the strike occurred prior to the Act and that it wa
strike in direct violation of an agreement not to stri
Obviously this position narrows the issue, as the de
sion by its very terms would not apply to a case in wh
a strike occurred subsequent to the enactment of
Labor Act although in violation of a contract not
strike. It is hardly possible that cases now arising
fore the National Labor Relations Board, after m
than three years of the existence of the Act, would
volve precisely this situation, viz., a strike prior to
Act in derogation of a collective bargaining agreem
also made prior to the Act. We think this factor al
sufficient justification for denying the present writ,
the basis for the decision of the Circuit Court below
too narrow to have any wide-spread application up
situations now arising.

In connection with the conclusion of the Court
low that the employment relationship ceased as a res
of the strike in violation of a wage agreement containi
an anti-strike provision, we think that the opinion of
Court might well have been buttressed by additio
facts established by the undisputed testimony. T
Court below relied for its finding upon the provision
the collective bargaining agreement between respond
and the Union representing respondent's employe
respecting the arbitration of disputes (R. 421), and

have no quarrel with its conclusion therefrom. In addition, however, the contract of July 14, 1934, referred to in the record and herein as the "Indianapolis Agreement", contained a provision to the following effect: (R. 16)

> "3. No employees have been or will be discriminated against because of his or her membership in or non-membership in, or affiliation with or non-affiliation with any union or labor organization."

This provision preserves what is known as the open-shop principle and, having been agreed to by the Union involved for the period of the agreement, was not subject to abrogation by the Union in that period. It appears, however, that the strike which occurred on March 23, 1935 (over three months prior to the enactment of the Labor Act), was because the respondent refused to accede to the closed-shop principle in derogation of the agreement. The record is replete with testimony indicating conclusively that the only real dispute between the Union and the respondent was on the basis of the closed shop. Time after time commencing with the negotiation of the Indianapolis Agreement and throughout the period of the agreement preceding the strike, the question of the closed shop was raised. The agreement was negotiated in July 1934, and at one of the meetings during the conduct of the negotiations one of the Union committee stated that neither she nor any other member of the Union would work with persons who were not members of the Union (R. 187). Despite this statement, the Union executed the Indianapolis Agreement, containing paragraph 3, quoted above. In October 1934, a resolution to the effect that members of the Union must be in good financial standing under penalty of loss of membership rights, was passed by the

Union and communicated to the respondent (Respondent's Exhibit 6 and 9). In a meeting of November 26, 1934, the President of the Indiana State Federation of Labor, acting for the Union, stated that "The Union doesn't want very much and you can grant it if you wish very readily. What the Union wants is a closed shop." (R. 199)

The Union proposals of January 4, 1935 (Respondent's Exhibit 1) included a proposal that respondent lay off any employee who was suspended from the Union. On March 11, 1935, this proposal was renewed. On March 17, the following resolution was passed and communicated to the respondent:

> "RESOLVED that the members of Federal Labor Union #19694, affiliated with the American Federation of Labor, believe that peace and harmony cannot exist under the present conditions owing to the unfair practices of the Company. We do hereby refuse to continue to work with anyone eligible for membership in our union who does not show willingness to become a member on or before March 23, 1935; * * *" (Petitioner's Exhibit 2)

The respondent refused to countenance the closed shop and on March 23, in accordance with the foregoing resolution, the strike was called (R. 64, 216). Therefore, in addition to the arbitration clause of the agreement with its anti-strike provision upon which the Court below placed chief emphasis, there was also a provision preserving the open-shop principle which was violated by the Union in its resolution of March 17 and its strike of March 23.

We argued to the Court below and we argue seriously to this Court that the National Labor Relations Act, by its statement of purposes and by all of its terms

and provisions, is for the purpose of encouraging collective bargaining between employer and employee, thereby promoting industrial peace and the free flow of commerce between the States. When a collective bargaining agreement whose provisions are fair, as the Court below found with respect to the Indianapolis Agreement (R. 421, 422), a finding which the petitioner does not controvert, has been entered into between employer and employee, it is important, not only from the standpoint of employment relationships generally but also from the standpoint of the law of contracts, that such agreements be respected, not only by the employer but also by the employee. There is no provision, express or implied, in the National Labor Relations Act that seeks to strike down fair collective bargaining agreements and, in fact, the petitioner herein would or should be the last agency to make any such assertion, as presumably the primary object of its existence is to foster and encourage fair collective bargaining agreements. Assuming, therefore, the situation in this case of a fair agreement directly violated by the employees, how can it be said that the refusal of the Court below to enforce the order of the Labor Board was in derogation of the National Labor Relations Act?

We argued in the Court below that there was no substantial evidence upon which to base the finding of the Board that the respondent refused a few days after July 23, 1935, to bargain collectively with its employees (R. 386). Apparently the Court below was not impressed with that argument and found that there had been a refusal to bargain and unfortunately used language which the petitioner has seized upon as of great importance to its prayer that a writ of certiorari be granted herein (Petitioner's Brief, page 12). We still insist that such a finding is not justifie. and not only

imputes knowledge to the respondent which it did not have, viz., that the Union had requested a meeting (R. 304), but also ignores the fact that the alleged request was made on July 23, 1935 (R. 303), the very day respondent was reopening its plant after four months of idleness (R. 238) and had its full time and attention occupied by matters of vastly more importance than a meeting to discuss the closed-shop principle.

We think it proper to point out, however, that the Court below, in stating that the respondent had violated the National Labor Relations Act, apparently overlooked the fact that such a finding is inconsistent with its major premise in the case that the employment relationship ceased to exist following the strike on March 23, 1935 (R. 421). Obviously, if that relationship was discontinued, then the respondent had no employees on July 23, 1935, to whom it owed a duty to bargain after the inception of the Labor Act, because all of them had voluntarily left their employment more than three months prior to the effective date of the Act.

We think it proper also to point out that the Court below, in making the finding of refusal to bargain on July 23, 1935, failed to consider this one instance in the light of the previous relationships between the respondent and the Union. From July 14, 1934, the date of the Indianapolis Agreement, to March 23, 1935, the date of the strike, the respondent met with representatives of the Union on at least eleven different occasions (R. 120, 188; 120, 189; 190; 122; 198; 203; 311; 205; 313; 209; 211). These were collective bargaining meetings and resulted in the adjustment of various matters (R. 201; 210). As stated above, the only real issue between the parties was that of the closed shop. The other matters upon which the Union purported to seek arbitration were simply a camouflage for the real issue of closed or

open shop, and on this issue the negotiations had reached an impasse. The respondent had resisted the closed-shop principle from the inception of negotiations on the Indianapolis Agreement; it had refused time after time to modify the open-shop provision in that agreement (R. 199; 311; 212); its position was not changed after the strike (R. 249, 250; 301) and the great damage inflicted upon it by the illegal acts of the strikers. Likewise, the Union had given no indication of receding from its demand for a closed shop and in fact renewed that demand on June 11, 1935, at a meeting with respondent called at the request of the Union to settle the strike (R. 299, 301). Under these circumstances a refusal to meet with representatives of employees is not a refusal to bargain collectively.

In *National Labor Relations Board v. Remington Rand, Inc., et al.*, 94 F. (2d) 862, the Circuit Court of Appeals for the Second Circuit used the following language:

> "As we have already said, the Act does not attempt to settle industrial disputes; it leaves the parties to the resultant of their opposed economic powers; and while it does force them to treat with each other, it may be assumed to contemplate only bona fide negotiation. *Hence, it is no doubt true that it does not require further negotiation after it becomes apparent that a settlement is impossible.*" (Italics ours).

This returns us to the basis of the decision of the Court below that a strike in violation of an agreement not to strike, which occurs prior to the Labor Act, relieves the employer from the duty to bargain collectively with such former employees or their representatives. We cannot help but reiterate that the issue in this case, even assuming it was resolved improperly by the Court below, which we deny, is so narrow as not to justify the granting of such special relief as a writ of certiorari.

II.

The Decision of the Court Below Is Not in Conflict With That of Another Circuit Court of Appeals.

The second proposition of the petitioner is to the effect that the decision of the Court below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit. This contention is utterly unfounded. In that case the refusal to bargain collectively and the discharge of a substantial number of employees for Union activity, constituting the alleged unfair labor practices, preceded the strike and the alleged misconduct of the employees. Obviously that is not the situation herein where the strike, in violation of an agreement not to strike, preceded the alleged failure to bargain collectively.

As stated by the petitioner (Brief, page 24, note 6), the employer in that case, viz., *National Labor Relations Board v. Remington Rand, Inc., et al.*, 94 F. (2d) 862, in its application to this Court for a writ of certiorari, claimed that the decision of the Second Circuit Court of Appeals was in conflict with the decision of the Court below. The writ was denied and we cannot assume, as counsel for the petitioner has assumed (Brief, page 24, note 6), that the reason for refusal was because the question of the effect of the misconduct of the employees was insubstantial. If insubstantial for the purposes of the petition by the employer in one case, it is certainly insubstantial for the purposes of a petition by the National Labor Relations Board. Again we say that the decision of the Circuit Court herein is based upon its own narrow set of facts and there is no decision in any other circuit in conflict therewith.

III.

No Question of Great Public Importance Is Involved.

The third reason of the petitioner for the granting of a writ of certiorari is that the primary question presented is of great public importance. We do not know that we can add anything to the previous discussion which so conclusively contradicts any such contention. The cases cited by the petitioner on this branch of the argument have nothing whatsoever to do with the present situation. We are not dealing with a question of simple misconduct on the part of employees which the Labor Board as an independent agency of the Government enforcing a policy statute can ignore and yet obtain relief on behalf of the alleged wrong-doers. We have here an agreement entered into prior to the National Labor Relations Act but completely consistent with the purposes of that Act; an agreement which is directly violated by one of the parties thereto. Although the language of the Circuit Court of Appeals below may be strained into an application of the "clean hands" doctrine generally, it was not so intended by the Court below, because the conclusion of the decision which we have quoted above states squarely the basis for the decision without reference to the equitable doctrine aforesaid.

IV.

The Order of the Labor Board Is Invalid Under the Decisions of This Court.

There is an additional aspect of this case which deprives it of any important or special reasons justifying the granting of a writ of certiorari. There is no dispute in the record that on June 11, 1935, all of the former employees of respondent were offered their jobs back without discrimination and without reference to their participation in the strike (R. 301). Many of them returned to work and by the second week of September 1935, the respondent had a complete force of men (R. 239), including a large number of former employees (R. 242), and has since that time carried on operations to the extent justified by the demand for its products. The order of the Board required the respondent to discharge all such employees in favor of a small coterie of disgruntled former employees who refused to return to work when work was offered. The Court below was undoubtedly impressed by the unfairness of such an order to the rights of such workers as had resumed their employment or had received the jobs of those who refused to go back to work. Especially so, in view of the long period that has elapsed since June 11, 1935, when employment was originally offered, a delay for which the Board cannot escape at least partial responsibility in failing to apply to the Court below until July 9, 1937, for enforcement of its own order of February 14, 1936.

This Court has held that such an order as the Board entered herein is invalid in that an employer is entitled to "protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers upon the election of the latter to resume their employ-

ment, in order to create places for them." *National Labor Relations Board v. Mackay Radio & Telegraph Company,* 58 S. Ct. 904, 911. The Circuit Court of Appeals for the Second Circuit has adopted the same rule (*Black Diamond Steamship Corp. v. National Labor Relations Board,* 94 F. (2d) 875). Under this decision the only relief grantable would be to place the small coterie of former employees on a preferred list of employment for the future. This involves no matter of great public importance justifying the special relief sought by petitioner.

The Court below must also have been impressed with the obvious impropriety of ordering the respondent to bargain collectively with the Union as exclusive representative of the respondent's production employees, an order made on the basis of facts existing, if at all, nearly three years ago and which now may well be entirely changed.

It is therefore respectfully submitted that there is no justification for the issuance of a writ of certiorari herein.

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